

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 88

ARTHUR THOMAS, PETITIONER

vs.

• STATE OF ARIZONA •

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1956
CERTIORARI GRANTED MARCH 4, 1957

Supreme Court of the United States

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INDEX

	Original	Print
Record from the U. S. D. C. for the District of Arizona, Phoenix Division.....	1	1
Petition for writ of habeas corpus.....	1	1
Memorandum of decision and order denying petition for writ of habeas corpus.....	6	4
Motion and petition for further hearing.....	10	5
Amended petition for writ of habeas corpus....	13	7
Affidavit in support of amended petition for writ of habeas corpus.....	15	8
Memorandum and affidavit in opposition to pe- tition for writ of habeas corpus and motion..	19	13
Proceedings in the U. S. Court of Appeals for the Ninth Circuit	27	19
Minute entry of argument and submission (omitted in printing).....	27	19
Opinion, Mathews, J.....	29	20
Concurring opinion, Pope, J.....	35	26
Judgment	37	28
Minute entry of Order denying petition for re- hearing	38	29
Clerk's certificate.....(omitted in printing)....	39	29
Order granting motion for leave to proceed in forma pauperis and petition for writ of cer- tiorari	40	29

[fol. 1] **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Phoenix Division

Docket No. Civ. 2386 Phx.

ARTHUR THOMAS, PETITIONER,

- vs -

THE STATE OF ARIZONA: ROBERT MORRISON, Attorney General of the State of Arizona; FRANK EYMAN, Warden of the State Penitentiary of the State of Arizona.

PETITION FOR WRIT OF HABEAS CORPUS—

Filed March 1, 1956

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

W. EDWARD MORGAN, counsel for the Petitioner, Arthur Thomas, being first duly sworn, upon his oath deposes and says:

That he is counsel of record in the State Courts of Arizona for the defendant Arthur Thomas in the following actions: State of Arizona vs. Arthur Thomas, in the Superior Court of the State of Arizona in and for the County of Cochise, Case No. 5931, and in the Supreme Court of the State of Arizona, Case No. 1045 and Case No. 1072.

That he makes this application on behalf of the defendant Arthur Thomas; that the defendant Arthur Thomas is a resident of the County of Cochise, State of Arizona, and a citizen of the United States of America.

That on the 26th day of June, 1953, said Arthur Thomas was found guilty by a trial jury and was sentenced to death by the Superior Court of the State of Arizona in and for the County of Cochise, for the murder of one Janie Miskovich.

That on the 18th day of October, 1954, the Supreme Court of the State of Arizona affirmed the decision of the

lower court and set the 5th day of January, 1955 as the date of execution.

That on the 16th day of November, 1954, petitioner's [fol. 2] motion for rehearing before the Arizona State Supreme Court was denied. That on December 2, 1954, the defendant, by counsel, moved for a new trial. That on December 18, 1954, the Superior Court of Cochise County, Arizona denied a motion for new trial. That on June 28, 1955, the Arizona State Supreme Court affirmed the decision of the lower court in denying the motion for the new trial and that said Court on that date set the 28th day of July, 1955 as the date for execution of the said Arthur Thomas.

That on December 5, 1955, the defendant, through this counsel filed with the United States Supreme Court a Petition for Writ of Certiorari, and that the United States Supreme Court, pending the determination of said Writ, granted a stay of execution. That on the 16th day of January, 1956, the United States Supreme Court, without opinion, denied the Writ of Certiorari. That on the 31st day of January, 1956, the Arizona State Supreme Court reset the date for execution of Arthur Thomas to March 7, 1956.

That Arthur Thomas is presently in the custody of Frank Eyman, Warden of the State Penitentiary for the State of Arizona at Florence, Arizona. That the said Arthur Thomas is held without right, for the reason that the Courts of Arizona were and are without authority to hold the said Arthur Thomas and that the Constitutional rights of said Arthur Thomas, which will be set forth with more particularity, were abridged and denied.

That transcripts of the proceedings in the trial in the Superior Court of the State of Arizona in and for the County of Cochise affirmatively show that on the date of apprehension, the defendant in that case, the party petitioner herein, Arthur Thomas, was roped and putitively lynched in the presence of Jack Howard, the then sheriff of the County of Cochise, State of Arizona.

That subsequent to said roping, and while under fear and coercion, the defendant in that case, the petitioner herein, Arthur Thomas, made certain statements, confes-

[fol. 3] sions of commission of the crime. - That one of the said "confessions, over the objection of counsel, was admitted into evidence, in violation of Article I of the United States Constitution and in violation of the Fourteenth Amendment to the United States Constitution. That further, in that action, petitioner herein Arthur Thomas was not granted the rights afforded under the Fourteenth Amendment to the United States Constitution, the right to due process, for the reason that by the actions of the Cochise County Attorney, the defendant Arthur Thomas was effectively denied the right of counsel; that this was accomplished when the said County Attorney engaged the services of an agent to contact the defendant while he was incarcerated in the County Jail of Cochise County, subsequent to the appointment of counsel for the defendant. That the sheriff of Cochise County, who was in control of said jail and who had daily contact with the defendant while he was in said jail, was the same sheriff who had been present when the putitive lynching took place, and who, according to the testimony of the Arizona State Highway Patrolman who was present, permitted the roping on more than one occasion and advised the defendant to admit his guilt or else he, the said sheriff, would let Arthur Thomas be hanged by the posse. That such circumstances, combined with the action of the County Attorney, destroyed the faith and confidence of [the defendant Arthur Thomas] in his attorneys and in truth and in fact resulted in [said defendant's] giving no aid or assistance or information to his counsel until after the time that the trial had started and during the course of that trial. That under the circumstances, said act on the part of [the defendant Arthur Thomas] in not aiding counsel was not by his own violation but was a result of the putitive lynching, the conduct of the sheriff and the conduct of the County Attorney, all in abridgement of [the defendant's] rights as a citizen of the United States of America.

[fol. 4] That further, the defendant was not afforded, at the time of his arraignment, the right of counsel, for the reason that he was not advised of his right to counsel

by the presiding magistrate. (In the course of the trial, the presiding magistrate testified in a conflicting fashion, once stating that he did advise the defendant of his right to counsel and once testifying in effect that he did not.)

For the reason that the date of execution has been set for March 7, 1956, pending the return of the Writ of Habeas Corpus your affiant petitions that this Court issue its Order to the proper authorities of the State of Arizona: to refrain and desist from executing the defendant until the matter of this petition for Writ of Habeas Corpus is finally determined.

And for all of the above reasons, and upon the basis of all of the above statements, your affiant prays this Court to issue a Writ of Habeas Corpus, directed to the Warden of the Arizona State Penitentiary, to show cause at a time and place to be set by this Court, why the defendant Arthur Thomas, in the custody of the said Warden, should not be released.

/s/ W. EDWARD MORGAN
W. EDWARD MORGAN
180 North Church
Tucson, Arizona

Attorney for Petitioner Arthur Thomas

Duly sworn to by W. Edward Morgan. Jurat omitted in printing.

[fol. 4a] (File Endorsement Omitted)

[fol. 5] AFFIDAVIT OF SERVICE BY REGISTERED MAIL—
(Omitted in Printing)

[fol. 6] IN THE UNITED STATES DISTRICT COURT*
FOR THE DISTRICT OF ARIZONA

Phoenix Division

(Title Omitted)

MEMORANDUM OF DECISION and ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS—March 2, 1956

Giving the generalities of the petition fullest intendment, it is charged that a coerced confession was admitted

at the trial, over objection, and that because of certain acts and conduct of the sheriff and district attorney, defendant did not give his counsel aid, assistance and information prior to the time of the trial.

These sketchy allegations do not warrant Federal District Court interference with State process within *Brown v. Allen*, 1953; 344 U. S. 443, the leading case. Nor is it stated whether these matters have been previously presented to the State courts. *Brown v. Allen*; *Daugharty v. Gladden*, Ore. 1953, 128 F. Supp. 95.

The petition for a Writ of Habeas Corpus is therefore denied.

Dated March 2, 1956.

/s/ CLAUDE MCCOLLOCH

Judge

(File Endorsement Omitted)

[fol. 7]

[fol. 8]

[fol. 9]

[fol. 10] IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Phoenix Division

(Title Omitted)

MOTION AND PETITION FOR FURTHER HEARING—

March 8, 1956

Comes now EDWARD MORGAN, Attorney for Petitioner ARTHUR THOMAS, and respectfully moves the Court to set a day and time for a further hearing on the Petition for Writ of Habeas Corpus filed herein, in order to present to the Court witnesses to be called by the Petitioner to sustain his allegations contained in said Petition for Writ of Habeas Corpus, to-wit:

HARRY SELCHOW, State Highway Patrol Officer, who was present at the time of the putitive lynching of the petitioner;

MR. CHRIS COLE, "Arizona Daily Star" reporter at the time of the putitive lynching, who made an investigation at the time;

WILLIAM SAUDERS, a photographer, who took pictures of the putitive lynching;

MAJOR DORSEY WATSON;

GUS ARZBERGER, one of the parties identified as a member of the posse who roped the petitioner defendant Arthur Thomas and who, at the time of the trial, refused to testify, claiming immunity under the Fifth Amendment of the United States Constitution;

ROBERT E. MACOMB, accused of being one of the parties who roped the petitioner;

[fol. 11] **ARTHUR THOMAS**, the petitioner himself, to give testimony and to be subjected to cross-examination;

MR. HAYZEL DANIELS, co-counsel for the defendant in the original trial;

MR. BURT TOMLINSON and **MR. ALBERT TOMLINSON**, Bisbee attorneys, co-counsel for the defendant in the original trial;

MR. PERCY BOWDEN, Chief of Police, City of Douglas, Arizona.

Petitioner further moves that the Court authorize the Clerk of Court to issue subpoenas to order witnesses to appear, upon the request of either the State of Arizona or the Petitioner herein; and, further, that the Court issue its Order, ordering the Warden of the State Penitentiary of Arizona to make the defendant Arthur Thomas, petitioner herein, available for said hearing in order to testify therein.

DATED this 8th day of March, 1956.

/s/ **EDWARD MORGAN**

EDWARD MORGAN

180 North Church

Tucson, Arizona.

Attorney for Petitioner

[fol. 12]

[fol. 13] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Phoenix Division

(Title Omitted)

AMENDED PETITION FOR WRIT OF HABEAS CORPUS—

Filed March 9, 1956

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

EDWARD MORGAN, being first duly sworn, upon his oath deposes and states:

That he has been the attorney of record for the defendant Arthur Thomas in all matters and proceedings herein and in the State courts of Arizona; that in supplement to the original petition for writ of habeas corpus filed herein, said Edward Morgan, for and on behalf of Arthur Thomas, further petitions the Court, to issue its Writ of Habeas Corpus for the reason and on the grounds that the Constitutional rights of the defendant were violated at the time of his trial in the State court on the charge of first degree murder, in that the evidence would indicate that the committing magistrate in that case, Justice Frazier, failed to advise the defendant of his Constitutional rights of obtaining counsel. This issue was ruled upon by the trial Court; was raised in a motion for new trial and denied; was presented as a proposition on appeal to the State Supreme Court and denied therein.

That the defendant petitioner has exhausted all of his other remedies and therefore petitions this Court that it grant a Writ of Habeas Corpus to the defendant Arthur [fol. 14] Thomas, upon the foregoing additional grounds.

/s/ EDWARD MORGAN

Subscribed and sworn to before me this 8th day of March, 1956.

/s/ ABE KASTEL
Notary Public

My commission expires:
January 19, 1959.

AFFIDAVIT OF SERVICE—(Omitted in Printing)

[fol. 15] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Phoenix Division

(Title Omitted)

AFFIDAVIT IN SUPPORT OF AMENDED PETITION FOR
WRIT OF HABEAS CORPUS—Filed March 9, 1956

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

EDWARD MORGAN, being first duly sworn, upon oath deposes and says:

That, to the best of his knowledge and in accordance with the statement of evidence filed in petitioner's original brief on appeal to the Supreme Court of the State of Arizona, and referring thereto, page 39, it is set forth as follows:

"On the first cross-examination of L. T. Frazier by the defense, the following took place:"

(Inasmuch as the defense counsel were without funds to produce another copy of the Transcript of evidence in the original trial, to submit to the United States Supreme Court with their petition for Writ of Certiorari, the defense exchanged several of its volumes with the Attorney General's office, State of Arizona, in order to get the neatest set of the transcript, and forwarded the full transcript to the United States Supreme Court, replacing the Attorney General's copy with volumes from the defendant's set. The net result is that the defendant and his counsel are now without a copy of the transcript of record and must therefore rely upon material which they have heretofore quoted in their briefs and petitions and the accuracy of 1: the original quotations and 2: the copy work made of said original petitions and briefs. The following is therefore quoted from defendant's copy of his brief to the [fol. 16] State Supreme Court, and we continue to quote therefrom. The references are to the pages in the tran-

script of the testimony in the original trial in the State Court.)

"P. 1887 T. 1, 19, Q. — "And you at no time told him (the defendant) that he was entitled to an attorney in your Court?" 1, 21, A. — "No."

"It must be pointed out that the County Attorney at this time did not attempt any redirect of the witness and left the statement by the witness Frazier as it was. It was only after Mr. Tomlinson, one of the attorneys for the defense, made his motion:

P. 1888 T. 1 3, "Mr. Tomlinson:

Your Honor, at this time we move to strike and expunge the testimony of Judge L. T. Frazier from the record on the grounds that his (the defendant's) constitutional rights, both national and state, have been violated on the grounds of he was not advised by the Justice Court that he could have an attorney to represent him."

1 15, "The Court: I will reserve ruling."

-39-

"And later, before any further testimony by Judge Frazier the Court overruled the objection, (p. 2072 T. 1. 18 and p. 2073 T. 1. 1) and after a recess during which time the County Attorney discussed with Judge Frazier his testimony (see p. 2083 T. 1. 25, 26 and p. 2084, 1. 1 et seq.) that the witness attempted to correct his testimony by saying that he *must* have informed the defendant of his rights, including the right to counsel. (See ACA—44-302).

"The Court should take into consideration the fact that Judge Frazier attempted to take the part of a prosecutor and interrogated the defendant.

P. 2083 T., 1. 4, Q. — (Défense Counsel Tomlinson): "And you didn't ask him if he killed the woman?" 1. 6, A. — (Judge L. T. Frazier): "After I read the complaint to him (the defendant) and he stated that he was guilty, that he did kill the woman, I asked him if he killed

her with an ax. He said 'No, I killed her with a knife.'"

1. 10, Q. —"How come you to ask him if he killed her with an ax?"

-40-

1. 12, A. —"Because I had been told her head was pretty badly crushed."

1. 14, Q. —"I see. And that is what prompted you to put him on examination and ask him if he had killed her with an ax?"

1. 17, A. —"That is right."

"Thus in effect the defendant was denied a preliminary examination and his so-called verbal waiver should be set aside as invalidated by the failure of the magistrate to inform the defendant of his right to counsel and under the rule of *State v. Hood*, 69 Ariz. 294, 157 P (2d) 698, the same is a denial of a due process under Art. 2, Sec. 30 of the Arizona constitution and Art. 14 of the Amendments to [fol. 17] "the U. S. Constitution. (Though *State v. Hood*, Supra, held there to be a waiver in that case because, as in that case, as differentiated from this, there was no direct evidence in the record that the judge failed to instruct the defendant of his right to counsel or in general.)

"This Negro farm-hand can hardly be said to know, understand and appreciate his con-

-41-

stitutional rights. He is further handicapped by the insufficient and confused explanation of the magistrate, by the presence of the Sheriff whom he was in fear of, and by the complete surrounding of unfriendly white officials. It is not too inconceivable to the reasonable mind that he would state anything to prevent harm coming to him. It is not apparent, further, from the record, whether the magistrate warned him that he need not make any statement, but that if he did make a statement such statements would be used against him in the trial of the offense.

"The Rules of Criminal Procedure, Sec. 47, provides as follows:

"STATEMENT BY DEFENDANT—When the examination of the witnesses for the state is closed, the magistrate shall inform the defendant that he may make a statement, not under oath, regarding the charge against him; that he is accorded this right in order to enable him, if he sees fit, to answer the charge and to explain the facts appearing against him, that he may refuse to make any statement, and that such refusal may not be used

-42-

against him at the trial, but that if he makes such statement, whatever he says therein may be given in evidence against him at the trial."

"The object of giving such caution or warning is twofold: To inform him that his statements will be used against him, hence what he says will be free and voluntary, and to prevent the proceedings from becoming an inquisition. *Maki v. State*, 18 Wyo. 481, 112 p. 334, *Wood v. U. S.*, (128 F 2d 265; 141 ALR 1318).

"In the case of judicial confessions, where a statute provides that caution must be given, it must appear that such warning was given before a confession is admissible.

22 CJS Criminal Law, Sec. 822

"In *State v. Cross*, 142 Tenn. 510, 221 SW 489, p. ALR 1354, it was held that the committing magistrate could not testify that one brought before him on a murder charge pleaded guilty, if he did not follow the statutory mandate requiring him to inform the defendant as to his right to counsel, and that any statements which he might make will be used against him on the trial of the matter. Where an

-43-

accused is without counsel upon a preliminary hearing to determine whether he should be held and it

[fol. 18] does not appear "that his constitutional rights have been safeguarded, his statements of guilt cannot be received in evidence against him. Before he speaks, the fair and equitable practice is that the Court should advise him of his rights to counsel and to inform him that if he makes a statement it will be used against him. *Woods v. U. S.*, Supra. While warning may not be decisive or important, alone, it is a circumstance to be noted in passing upon the admissibility of the confession, where a magistrate does not follow the statutory requirements in advising the accused of his right to counsel and his peril if he makes a statement. Where circumstances are unusual, it may not be assumed that the accused appreciated his constitutional rights.

"Haley v. Ohio, 332 U.S. 596, 92 L. ed.

-44-

"It is error not to allow the defense an opportunity to show that all of the confessions obtained were voluntary. *White v. State*, 24 ALR 699

"In the instant case, the Court did not permit defendant an opportunity to show that at the time he made the statements to Judge Frazier his mind was not free from fear. (See p. 2091-2098 T.) This was a fear which began on the afternoon of March 17, 1953, at the scene of the arrest. At that time and place, defendant was threatened with hanging, if he did not tell the sheriff Jack Howard, and other deputies, who killed the victim. This fear was further increased by the action of the sheriff in taking the two Negro arrestees to view the body of the dead woman at the mortuary, and further all during the time the defendant was out of jail he was in the custody of Sheriff Howard.

"It may also be noted that the Court ruled on two subsequent confessions which it

-45-

concluded was induced by fear. It is not understood how the Court arrived at the conclusion that the

confession made before Judge Frazier was free and voluntary, when the defendant was not permitted to show its involuntariness."

-46-

/s/ EDWARD MORGAN
EDWARD MORGAN
180 North Church
Tucson, Arizona
Attorney for Petitioner

Subscribed and sworn to before me this 8th day of March, 1956.

/s/ ABE KASTEL
ABE KASTEL
Notary Public

My commission expires:
January 19, 1959.

[fol. 18a] (File Endorsement Omitted)

[fol. 19] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Phoenix Division
(Title Omitted)

MEMORANDUM AND AFFIDAVIT IN OPPOSITION TO PETITION
FOR WRIT OF HABEAS CORPUS AND MOTION
March 9, 1956

COMES NOW The Attorney General of the State of Arizona and presents the following authorities and argument in opposition to the petition and motion herein.

"So far as weight to be given the proceedings in the courts of the state is concerned, a United States District Court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed."

Brown v. Allen, 344 U.S. 443.

The State of Arizona contends that this language of *Brown v. Allen* is applicable here; in that the State action was based on an adequate State ground thoroughly set forth in the opinion of the Arizona Supreme Court in *State v. Thomas*, 275 P. 2d 408, 78 Ariz. 52. Since there is, under Arizona law, a state remedy for the deprivation of federal constitutional rights, and since the State action was based on adequate ground, we respectfully submit that no further examination by the federal district court is required.

In addition, *Brown v. Allen*, supra, further states:

"Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the district court may properly depend upon the state's resolution of the issue."

[fol. 20] While the State does not admit that there is such material conflict in the evidence in this case, under the cited language if there were such conflict this Court may properly depend upon the State's resolution of the issue.

Brown v. Allen, supra, further states:

"Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the writ without more, if the court is satisfied by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required."

The State respectfully submits that the record in this matter is sufficient to afford an adequate opportunity to weigh the sufficiency of the allegation of the evidence. The State has submitted to this Court the entire transcript of testimony of the original trial of *State v. Thomas* held in the Superior Court, Cochise County,

Arizona. In addition, the State submits, herewith, all briefs filed in this matter by the petitioner and the State of Arizona before the Arizona Supreme Court and the United States Supreme Court.

The State of Arizona, therefore, opposes petitioner's motion for a further hearing for the purpose of presenting witnesses in this matter.

The State of Arizona contends that the rule stated in *Brown v. Allen*, supra, "When the facts admitted by the state show coercion . . . a conviction will be set aside as violative of due process." is not applicable to this case because upon the record no coercion was shown in the facts admitted by the State.

In the case of *Stein v. New York*, 346 U.S. 156, the Court said:

"It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. Primarily, and in most cases final, responsibility for determining contested facts rests, and must rest, [fol. 21] upon state trial and appellate courts. A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect."

The Stein case, which arose in the State of New York, involved an alleged coerced confession. It is significant in that the law of the State of New York is almost identical with the law of the State of Arizona with respect to the admission of confessions and a determination of their voluntariness. The Arizona law on the subject is fully set forth on Page 65 of Appellant's Brief in

the Supreme Court of the State of Arizona, Case No. 1045. In the Stein case the Court said that if the evidence is conflicting as to whether or not the confession was coerced, and if the trial court has submitted such question to the jury under proper instructions, and if there is sufficient evidence without the consideration of the confession, the federal court should not disturb the judgment.

"Against this factual background, we do not think our cases establish that to submit a confession to a state jury for judgment of the coercion issue automatically disqualifies it from finding a conviction on other sufficient evidence, if it rejects the confession. Here the evidence of guilt, consisting of direct testimony of the surviving victim, Waterbury, and the well-corroborated accomplice, Dorfman, as well as incriminating circumstances unexplained, is enough apart from the confessions so that it could not be held constitutionally or legally insufficient to warrant the jury verdict. Indeed, if the confession had been omitted and the convictions rested on the other evidence alone, we would find no grounds to review, not to mention to reverse them.

We would have a different question if the procedure had been that which may have been in mind when some of our cases were written. Of course, where the judge makes a final determination that a confession is admissible and sends it to the jury as a part of the evidence to be considered on the issue of guilt and the ruling admitting the confession is found on review to be erroneous, the conviction, at [fol. 22] least normally, should fall with the confession.

But here the confessions are put before the jury only tentatively, subject to its judgment as to voluntariness and with binding instructions that they be rejected and ignored unless found beyond reasonable doubt to have been voluntary. By petitioners' hypothesis on this point, the jury itself rejected the confessions. The ample other evidence makes this

a possible, if not very convincing, explanation of the verdict. By the very assumption, however, there has been no error, for the confessions finally were rejected as the free choice of the jury.

We could hold that such provisional and contingent presentation of the confessions precludes a verdict on the other sufficient evidence after they are rejected only if we deemed the Fourteenth Amendment to enact a rigid exclusionary rule of evidence rather than a guarantee against conviction on inherently untrustworthy evidence. We have refused to hold it to enact an exclusionary rule in the case of other illegally obtained evidence."

Stein v. New York, 97 L. Ed. 1522 (346 U.S. 156; 73 S. Ct. 1077)

As an ironclad indication that the events surrounding the arrest of the defendant did not force or coerce him into making the confession to Judge Frazier, the State points to the fact that on the preceding evening he made a statement to the County Attorney in which he denied the killing. (See statement taken at County Attorney's home on March 17, 1953, at 7:00 P.M., attached hereto).

Further, he denied the killing even at the time the arrest was made when the purported threats of hanging were made.

The first time he admitted guilt was in the calm atmosphere and sanctity of open court. If he was in a state of fear at that time, it was from something that happened between 7:00 o'clock the previous evening when he denied guilt and 11:00 o'clock the next morning when he admitted guilt to Judge Frazier. He doesn't contend that anything of that nature did occur during that period. He was advised the previous evening by the County Attorney that no promises of leniency were being given and no threats were being made. (See attached).

[fol. 23] In conclusion, the State believes the language of *Stein vs. New York*, supra, is applicable to the petition and motion herein;

"We are not willing to discredit constitutional doctrines for protection of the innocent by making

of them mere technical loopholes for the escape of the guilty. The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law."

Respectfully submitted,

ROBERT MORRISON
The Attorney General

/s/ JAMES H. GREEN, JR.
JAMES H. GREEN, JR.
Special Assistant Attorney
General
108 Capitol Building
Phoenix, Arizona

/s/ WES POLLEY
WES POLLEY
Cochise County Attorney
Attorneys for Respondent.

Copies mailed this 9th day of
March, 1956, to Edward W. Morgan,
180 North Church, Tucson, Arizona,
Attorney for Petitioner.

[fol. 24]

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

AFFIDAVIT

WES POLLEY, the affiant, after being duly sworn deposes and says:

That he is the duly elected, qualified and acting county attorney of Cochise County, State of Arizona, and was during the month of March, 1953; that during that month he was confined to his home in a hospital bed by virtue of being in a full length body cast, due to an injury; that at approximately seven o'clock P.M. on March 17, 1953, the defendant was brought to his home, by the

sheriff and one or more deputy sheriffs, for questioning; this was approximately three or four hours after the defendant was arrested and taken into custody near Willcox, Arizona; the intervening time had been spent by the sheriff taking the defendant to Willcox in search of a magistrate; upon a court reporter being called to the home of the county attorney, the statement of the defendant was taken beginning at seven o'clock P.M.; the defendant was told by the county attorney "I want to ask you about this occurrence over in Kansas settlement; I am not going to make you any promises if you do talk to me and I am not going to make you any threats if you don't talk to me; whatever I ask you I want you to tell me freely and I want you to tell me [fol. 25] the truth." After being so advised the defendant freely answered questions which amounted to a continuous denial of any personal guilt in connection with the death of Mrs. Miskovich. The defendant explained how the killing took place, but accused a young negro boy named Ross Lee Cooper as being the killer.

DATED this 9th day of March, 1956.

/s/ WES POLLEY
Affiant

Subscribed and sworn to before me this 9th day of March, 1956.

/s/ ORALIA M. RAJAS
Notary Public

My Commission expires:

September 23, 1956.

Copy of the foregoing Affidavit
mailed this 9th day of March, 1956,

to: EDWARD MORGAN, 180 Church St., (North)
Tucson, Arizona
Attorney for Petitioner.

• • • • •

[fol. 27] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
May 18, 1956—(Omitted in printing)

[fol. 29] IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,098

ARTHUR THOMAS, *Appellant*,

vs.

FRANK EYMAN, Superintendent of the State Prison of
Arizona, *Appellee*.

Appeal from the United States District Court
for the District of Arizona.

Before: MATHEWS, POPE and LEMMON, Circuit Judges.

OPINION—August 8, 1956

MATHEWS, Circuit Judge:

On March 16 or 17, 1953, Janie Miskovich was murdered in Cochise County, Arizona. Thereafter, on March 17, 1953, her body was found, an investigation was made, and appellant, Arthur Thomas, was arrested in Cochise County by Jack Howard, sheriff of that county. On March 18, 1953, the sheriff took appellant before a magistrate—L. T. Frazier, a justice of the peace in Cochise County—for preliminary examination; appellant waived such examination; the magistrate held appellant to answer to the Superior Court of the State of Arizona in and for Cochise County and fixed his bail at \$25,000; and, appellant having failed to furnish bail, the magistrate committed him to the custody of the sheriff.¹

Thereafter, in the Superior Court, an information was filed charging appellant with the murder.² Appellant was [fol. 30] arraigned, pleaded not guilty and had a jury trial. The trial began on June 1, 1953, and ended on June 19,

¹ See Rules 35, 39, 40 and 55 of the Arizona Rules of Criminal Procedure, A.C.A. (Arizona Code Annotated) 1939, §§ 44-140, 44-302, 44-303 and 44-322.

² See Rules 112 and 114 of the Arizona Rules of Criminal Procedure, A.C.A. 1939, §§ 44-501 and 44-503.

1953, when the jury returned a verdict finding appellant guilty of first-degree murder and fixing his punishment at death.³ Appellant moved for a new trial. The motion was denied on June 26, 1952. Thereupon, on June 26, 1953, the Superior Court rendered judgment on the verdict, sentenced appellant to death and issued a warrant directing the sheriff to deliver appellant to the superintendent of the State prison of Arizona for execution.⁴ The sheriff did so deliver appellant on or before July 6, 1953. At all times thereafter, appellant was a prisoner in the superintendent's custody pursuant to the Superior Court's judgment.

Appellant appealed from the Superior Court's judgment to the Supreme Court of the State of Arizona, hereafter called the Arizona Supreme Court. The Arizona Supreme Court affirmed the Superior Court's judgment on October 18, 1954.⁵ Appellant moved the Arizona Supreme Court for a rehearing. The Arizona Supreme Court denied that motion on November 16, 1954. On December 2, 1954, appellant filed in the Superior Court a second motion for a new trial.⁶ The Superior Court made an order denying that motion on December 18, 1954. Appellant appealed from that order to the Arizona Supreme Court. The Arizona Supreme Court affirmed that order on June 28, 1955.⁷ Appellant petitioned for certiorari to review both decisions of the Arizona Supreme Court—the decision affirming the Superior Court's judgment⁸ and the decision affirming the Superior Court's

³ See A.C.A. 1939, § 43-2903.

⁴ See Revised Code of Arizona 1928 § 5119; *Conway v. Arizona*, 60 Ariz. 69, 131 P. 2d 983.

⁵ *State v. Thomas*, 78 Ariz. 52, 275 P. 2d 408.

⁶ The motion of December 2, 1954, was or purported to be a motion for a new trial on the ground of newly discovered evidence. See Rules 355 and 357(c) of the Arizona Rules of Criminal Procedure, A.C.A. 1939, §§ 44-2002 and 44-2004(c).

⁷ *State v. Thomas*, 79 Ariz. 158, 285 P. 2d 612.

⁸ *State v. Thomas*, 78 Ariz. 52, 275 P. 2d 408.

order denying appellant's second motion for a new trial.⁹ Certiorari was denied on January 16, 1956.¹⁰

[fol. 31] Thereafter, in the United States District Court for the District of Arizona, W. Edward Morgan, acting in behalf of appellant,¹¹ filed two applications¹²—one on March 1, 1956, and one on March 9, 1956—each praying for a writ of habeas corpus directed to appellee, Frank Eyman, who, on March 1, 1956, and at all times thereafter, was superintendent of the State prison of Arizona.¹³

The District Court did not at any time grant appellant a writ of habeas corpus or issue an order directing appellee to show cause why such a writ should not be granted,¹⁴ nor did it hold a plenary hearing on the applications. However, appellee's counsel appeared before the District Court and, on March 9, 1956, filed with the District Court a transcript¹⁵ of all proceedings had and all testimony taken in the Superior Court¹⁶ and copies of all briefs filed in the Arizona Supreme Court on appellant's appeal from the Superior Court's judgment. Having considered the applications, the transcript, the briefs and the Arizona Supreme Court's decision affirming the Superior Court's judgment,¹⁷ the District Court, on March 13, 1956,

⁹ State v. Thomas, 79 Ariz. 158, 285 P. 2d 612.

¹⁰ Thomas v. Arizona, 350 U.S. 950.

¹¹ W. Edward Morgan, Hayzel B. Daniels and I. B. Tomlinson were counsel for appellant in the Superior Court and in the Arizona Supreme Court.

¹² Each application consisted of an affidavit made and signed by Morgan. Appellant did not sign or verify either of them. The first application was entitled "Petition for writ of habeas corpus." The second application was entitled "Amended petition for writ of habeas corpus."

¹³ In the applications, appellee was called a warden, and the State prison was called a penitentiary.

¹⁴ See the first paragraph of 28 U.S.C.A. § 2243.

¹⁵ The transcript was in eight volumes (2,616 pages). It was part of the record on appellant's appeal from the Superior Court's judgment and is part of the record here.

¹⁶ See 28 U.S.C.A. § 2247.

¹⁷ State v. Thomas, 78 Ariz. 52, 275 P. 2d 408.

entered an order denying the applications. From that order appellant has appealed.

Appellant contends that the District Court erred in denying the applications without granting a writ of habeas corpus or issuing an order to show cause and without a plenary hearing.

Appellant being a State prisoner, the District Court could not properly grant him a writ of habeas corpus [fol. 32] unless it appeared that he was in custody in violation of the Constitution of the United States.¹⁸

In determining whether appellant was entitled to a writ of habeas corpus, it was proper for the District Court to consider—as it did—the transcript of proceedings had and testimony taken at appellant's trial, the briefs filed on appellant's appeal from the Superior Court's judgment and the Arizona Supreme Court's decision affirming that judgment, as well as the applications.¹⁹

The first application—the one filed on March 1, 1956—stated that “on the date of apprehension,²⁰ [appellant] was roped and putatively [sic] lynched in the presence of Jack Howard, the then sheriff of [Cochise County];” that “subsequent to said roping, and while under fear and coercion, [appellant] made . . . confessions of commission of the crime,”²¹ and that “one of said confessions, over the objection of counsel,²² was admitted into evidence,²³ . . . in violation of the Fourteenth Amendment to the United States Constitution.”

¹⁸ See 28 U.S.C.A. § 2241(c); *Brown v. Allen*, 344 U.S. 433.

¹⁹ *Brown v. Allen*, supra; *Boyden v. Webb*, 9 Cir., 208 F. 2d 203. See also *Schell v. Eidson*, 8 Cir., 203 F. 2d 902; *United States ex rel. Gawron v. Ragen*, 7 Cir., 211 F. 2d 902; *United States ex rel. O'Connell v. Ragen*, 7 Cir., 212 F. 2d 272; *Ferguson v. Manning*, 4 Cir., 216 F. 2d 188; *Bailey v. Smyth*, 4 Cir., 220 F. 2d 954.

²⁰ Meaning, we suppose, the date of appellant's arrest—March 17, 1953.

²¹ Meaning, we suppose, the crime of murdering Janie Miscovich.

²² See footnote 11.

²³ Meaning, we suppose, that the confession was admitted into evidence at appellant's trial.

Liberal construed, these statements may be taken to mean that an involuntary confession of appellant was admitted into evidence at his trial in violation of the Fourteenth Amendment. Thus the first application may be deemed to have raised a Federal constitutional issue, namely, whether the Fourteenth Amendment was so violated. No other Federal constitutional issue was raised in or by either of the applications.

The transcript showed the following facts:

The only "confession" admitted into evidence at appellant's trial was an oral statement made by him on March [fol. 33] 18, 1953, when he was taken before the magistrate (L. T. Frazier) for preliminary examination. That statement, hereafter called the confession, was admitted into evidence by the admission of the magistrate's testimony concerning it. That testimony was as follows:

"He [appellant] was there on the charge of murder. I read the complaint to him and told him that he had a right to a preliminary hearing in the justice court,²⁴ or he might waive that right and have his hearing in the Superior Court. I told him he had the right to employ an attorney to assist him in preparing his case, and that he would be allowed a reasonable length of time for the preliminary hearing, and he said, 'I don't need any lawyer. I am guilty. I killed the woman.'"²⁵

Prior to the admission of the above quoted testimony, evidence was presented in the absence of the jury on the issue of the voluntariness of the confession, and, as a preliminary matter, the Superior Court held that it was voluntary.²⁶ Thereafter evidence on the issue of voluntariness was presented to the jury, the above quoted

²⁴ Meaning, obviously, a preliminary hearing before the magistrate, the magistrate being, in this case, a justice of the peace.

²⁵ The above quoted testimony of the magistrate was given on his direct examination. On cross-examination by appellant's counsel, the magistrate testified: "After I read the complaint to him and he stated that he was guilty, that he did kill the woman, I asked him if he killed her with an ax. He said, 'No. I killed her with a knife.'"

²⁶ This holding was announced in the absence of the jury.

testimony was admitted, and the issue of voluntariness was submitted to the jury with appropriate instructions.²⁷

On his appeal from the Superior Court's judgment, appellant assigned as error the admission of the above quoted testimony, his contention²⁸ being that its admission violated the Fourteenth Amendment, (1) in that the confession shown by the testimony was a plea of guilty which he had entered when taken before the magistrate for preliminary examination and had withdrawn by pleading not guilty in the Superior Court; and (2) in that the confession was involuntary.

Rejecting appellant's contention, the Arizona Supreme Court held that the confession was not a plea of guilty, there being in Arizona no such thing as an arraignment.

²⁷ The instructions on this issue were as follows:

"The State has introduced in evidence before you certain statements claimed to have been made by the defendant [appellant] after his arrest and while he was in the custody of the officers of the law, which statements are relied on in part by the State to establish the guilt of the defendant of the offense charged, and you are instructed, ladies and gentlemen of the jury, that confessions and statements made by one charged with an offense must be carefully scrutinized and received with great caution; yet, when they are made voluntarily and deliberately, such confessions and statements may be considered as evidence for and against the person making them, the same as any other evidence, but if a confession or statement is made by one in custody under such circumstances as show he was induced to make the same by punishment, intimidation or threats on the part of the persons who had him in charge, or that show that the confessions and statements were not freely and voluntarily made, then they cannot be considered as evidence against the person making them.

"In this case if you do not find that the confessions and statements by the defendant while in custody were freely and voluntarily made and made without punishment, intimidation or threats on the part of the persons having the defendant in custody, then you must disregard such statements or confessions as affording any evidence against the defendant whatsoever.

"I further instruct you that you may consider prior acts of intimidation, threats or punishment to the defendant, if made, in considering whether or not a confession made at a later time is voluntary or involuntary."

²⁸ This appeared from the brief filed by appellant on his appeal from the Superior Court's judgment.

or a plea of guilty or not guilty in a preliminary examination; that the above quoted testimony was properly admitted; and that the issue of the voluntariness of the confession was properly submitted to the jury.²⁹

Thus the Arizona Supreme Court determined adversely to appellant the only Federal constitutional issue raised in the habeas corpus proceeding. The District Court accepted that determination as correct. Hence the District Court was not required to grant a writ of habeas corpus or to issue a show cause order or to hold a plenary hearing.³⁰

Order affirmed.

POPE, Circuit Judge:

I concur. What convinces me that the court below did not err in exercising its discretion to accept the State court's resolution of the fact issues involved is the admirable manner in which the State trial judge dealt with what the Arizona Supreme Court called the "unsavory incidents" which attended petitioner's apprehension and arrest.

It is apparent that the trial judge believed the testimony of a State Highway patrolman that the county sheriff not only stood by while petitioner and another prisoner in his custody were roped about the neck and dragged by mounted members of a mob, but that he even said to petitioner "Will you tell the truth, or I will let them go ahead and do this," or "I will go ahead and let them use this."¹

By a ruling which, it must be conceded, was in accordance with the highest traditions of the bench, the trial judge held that the effects of this misconduct on the part of the sheriff were such that a confession taken from Thomas the following day by the county attorney, and a confession taken two days later at the county attorney's

²⁹ State v. Thomas, 78 Ariz. 52, 275 P. 2d 408.

³⁰ See cases cited in footnote 19.

¹ See the Arizona Supreme Court decision, State v. Thomas, Ariz., 275 P. 2d 408 at p. 418.

office, must both be rejected and excluded as coerced and involuntary. It was prior to the taking of either of these rejected confessions that Thomas was taken before the magistrate where he admitted his guilt. The argument is, that if Thomas was so terrorized by the officially condoned threats of lynching that his later confession in the county attorney's office could not be voluntary, then his statement to the magistrate, which followed even more closely the lynching threats, must likewise be taken to have been received when he was under the same psychological coercion, particularly in view of the fact that he was then without counsel, and only the same sheriff, and one of his deputies was present aside from the court officials.

More precisely, the contention is that the federal court should have taken testimony and itself examined into this fact question, and in connection therewith have permitted the petitioner to give his testimony. For reasons which satisfied them counsel for petitioner did not put him on the stand at the preliminary inquiry, in the absence of the jury, into the circumstances of the confession. This failure to use his testimony is something of which petitioner cannot complain here.² It is complained that at the time of this preliminary ruling defense counsel did not know that the highway patrolman's chief had forbidden him to talk to them, and did not know that his testimony would show these "unsavory incidents", and hence the trial judge was not informed of this when he admitted the magistrate's testimony.³ But after the preliminary admission of this confession, the whole question as to whether it was voluntary was submitted to the jury by instructions as to which no fault is found, and the

² "A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus." *Brown v. Allen*, 344 U.S. 443, 487.

³ Appellant asserts that the trial judge later stated that had he heard the patrolman's story before he ruled, he would have excluded this confession. Appellee says the record does not show any such thing. Appellant supplies no transcript references and we are unable to find anything to this effect in the record.

jury of course heard the patrolman's testimony, and its verdict resolved the question. Also, the trial judge later denied a new trial.

I am not only unable to perceive any respect in which the State trial judge failed to afford petitioner due process in respect to a determination of the question of whether this confession was coerced. Those best able to judge of this question of fact, the judge and the jury, dealt with it in a manner which shows no vital flaw. With the demonstrated strict regard which the trial judge obviously had for the protection of petitioner's constitutional rights, I see no reason why the court below should not accept his and the jury's determination.

(File endorsement omitted.)

[fol. 37] IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15098

ARTHUR THOMAS, *Appellant*,
vs.

FRANK EYMAN, Superintendent of the State Prison of
Arizona, *Appellee*.

JUDGMENT—Filed and Entered, August 8, 1956

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(File endorsement omitted.)

[fol. 38] IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DENYING PETITION FOR
REHEARING—September 12, 1956

On consideration thereof, and by direction of the Court,
IT IS ORDERED that the petition of Appellant, filed
September 10, 1956, and within time allowed therefor by
rule of court for a rehearing of the above cause be, and
hereby is denied.

[fol. 39]

[fol. 40] SUPREME COURT OF THE UNITED STATES

(Title omitted)

On petition for writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—

March 4, 1957

On consideration of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be,
and the same is hereby, granted. The case is transferred
to the appellate docket as No. 812.

And it is further ordered that the duly certified copy
of the transcript of the proceedings below which accom-
panied the petition shall be treated as though file in
response to such writ.